IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO. 339 of 2006

Unitech Limited .. Petitioner

versus

M/s.Anand Shree (Bombay) Holdings Pvt.Ltd. .. Respondent

...

Mr.Aspi Chinoy, Sr. Advocate with Mr.M.C. Arvind i/b Juris Consultus for the petitioner.

Mr.Ravi Kadam, Advocate General with Mr.Birendra Saraf i/b Markand Gandhi & Co. for the respondent. no.1.

CORAM : D.G. KARNIK,J.

DATED : 17th January 2007.

P.C.:

1. By this petition under section 9 of the Arbitration & Conciliation Act 1996 (for short "the Arbitration Act" the petitioner seeks an order of temporary injunction restraining the respondent, its

Officers employees and assigns from selling or transferring the disputed property admeasuring 100 acres of contiguous land described in the second schedule of the agreement dated 20th March 1989.

2. By the agreement dated 20th March 1989, the respondent agreed to sell to the petitioner 100 acres of contiguous land more particularly described in the second schedule to the agreement (hereinafter referred to as "the suit land"). The agreement recites that the respondent was in the process of purchasing about 911 acres of land at Villages Shirgaon, Chandansar, Narangi and other places near Virar in the district of Vasai and described in the first schedule to the agreement. By the said agreement, respondent agreed to allot and transfer to the petitioner the suit land admeasuring 100 acres out of the 911 acres of land which the respondent was in the process of purchasing. In pursuance of the said agreement, petitioner paid to the respondent a sum of Rs.1 crore as an earnest/advance and agree to pay the balance consideration in instalments specified in the agreement. The agreement specifically states that the petitioner was purchasing the property for the purpose of the

development as a building site. Clause no.18 of the agreement provides that in the event the property was incapable of being developed for any reason whatsoever or the title was not found to be marketable or non agricultural permission was not granted and land was not urbanisable land the petitioner would have an option to claim back the earnest money together with interest at 21% p.a.

3. It appears that for several years after the agreement dated 20th March 1989, the respondent was not able to purchase th eland. Till the year 2002, he was able to purchase only about 50 acres of land out of the 911 acres of land agreed to be purchased by it. It appears that out of the said 50 acres only 27 acres fell in the area which was agreed to be sold and/or allotted to the petitioner. By a letter dated 20th September 2002 the petitioner informed the respondent that as the respondent had not been able to perform his part of the contract the respondent should refund to the petitioner the advance of Rs.1 crore together with interest at 21% p.a. Instead of accepting the said request the respondent responded by a reply dated 6th December 2002 and stated that as per the new policy of the government it was possible

to develop all tracks of land of minimum 100 hectares and that policy would make the entire plot which was about 400 hectares immediately developable. The respondent therefore requested the petitioner to bear with it for some time till it got the matter cleared when the suit land would be handed over to the petitioner. By a further letter dated 14th October 2002, respondent confirmed that it would be in a position to deliver the suit land soon and requested the petitioner to keep the balance consideration ready. By a further letter dated 7th February 2005, the respondent informed the petitioner that the disputed land was in urbanisable zone and it was looking forward for further permissions and would revert back to the petitioner soon.

4. It appears that thereafter the respondent wants to wrigle out of the contract and does not want to allot the suit land to the petitioner. Apprehended that the respondent would not perform his part of the contract and would not allot the suit land to the petitioner, the petitioner had issued notice dated 24th October 2005 calling upon the respondent to submit to arbitration in accordance with the arbitration agreement contained in clause 20

of the agreement dated 20th March 1989. I am informed at the bar that in pursuance of the notice the petitioner has filed a petition under section 11 of the Arbitration Act for appointment of an arbitrator which is pending before the Hon'ble the Chief Justice of this Court. Apprehending that the respondent would transfer the suit land before the arbitrator is appointed and an interim relief is obtained from the Arbitral Tribunal, the petitioner has filed this petition under section 9 of the Arbitration Act for interim relief of injunction.

5. Mr.Kadam, the learned Advocate General appearing for the respondent strongly opposed grant of interim relief. He submitted that for the purpose of grant of interim relief under section 9 of the Arbitration Act the petitioner is required to make out a strong prima facie case that petitioner was likely to succeed in the arbitration. He submitted that for getting a relief of injunction in the present petition the petitioner would be required to prove that if he were to file a suit for specific performance he would be entitled to an injunction in the suit. He submitted that if the facts proved by the petitioner were not such as would have entitled

him to the relief of injunction from a civil court if it were to file a suit, the petitioner would not be entitled to a relief of injunction in a petition u/s.9 of the Arbitration Act. In my view the submission deserved to be accepted. The petitioner would not be entitled to an injunction in under section 9 of the Arbitration Act unless he makes out a strong prima facie case of his likelihood of success if he were to file a suit. If the petitioner were to file a suit he would have been required to prove that he has a strong prima facie case to get a relief of injunction. In a petition under section 9 of the Arbitration Act also, he must prove that he has a strong prima facie case before the arbitrator in order to entitle him to a relief of injunction.

6. Learned Advocate General submitted that the petitioner had not made out a strong prima facie case. There was no concluded contract between the parties. The respondent was not the owner of the property when it entered into the agreement with the petitioner. The respondent was only in the process of negotiation with the owners of the property. The respondent therefore could not have entered into an agreement to sell the suit property to the petitioner

as it was not the owner. He further submitted that the suit property was not identifiable as it was not clearly described in the second schedule of the agreement. Second schedule was of the larger property and only 100 acres out of the property described in the 2nd schedule was offered for allotment to the petitioner. The exact 100 acres which form the suit property was not described and therefore also there could be no concluded contract.

7. In my view the submission is devoid of merit. Section 43 of the Transfer of Property Act provides that where a person not having a title to the property transfers the property for a consideration to another, the transfer at the option of the transferee shall operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. Therefore even if the respondent had no title to the suit property but was only negotiating for acquiring the title, the agreement, at the option of the petitioner would operate on the suit property which the respondent may acquire during the subsistence of the agreement. The insist that the respondent must transfer the suit property to him and the transfer

would operate on the interest which the respondent may acquire in the property in future. Therefore the mere fact that the respondent was not the owner of the suit property when he entered into the agreement dated 20th March 1989 would not disentitle the petitioner form claiming the relief for specific performance.

8. The property described in the schedule 2 of the agreement may be larger than 100 acres but the agreement itself provides what the suit property is. Clause(1) of the agreement provides that 100 acres of contiguous land from the land described in the second schedule adjoining to the proposed DP Road would be allotted to the petitioner. Clause(1) further provides that in the event the respondent was unable to allot 100 acres of land from the land described in the second schedule it shall allot the balance land from the adjoining land. Thus the agreement provides for the method of identification of the suit property which was to be allotted to the petitioner. Whether the suit property is capable of being identified or not is a matter to be decided by Arbitral Tribunal. It cannot be said that the suit property is ex-facie not identifiable. That is a matter within the

jurisdiction of the Arbitral Tribunal and it cannot be said that the agreement cannot be specifically performed on the ground that ex-facie the suit property is not identifiable.

9. Learned Advocate General further submitted that under section 16(c) of the Specific Relief Act, the petitioner was required to aver and prove that he was ready and willing to perform his part of the contract in order to get any relief form the Arbitral Tribunal. He submitted that the facts show that the petitioner was not ready and willing to perform his part of the contract and therefore, the petitioner is not entitled to any relief. Learned Advocate General strongly relied upon the letter of the petitioner dated 20th September 2002 wherein the petitioner had asked for the refund of Rs.1 crore. He submitted that since the petitioner himself had asked for the refund of Rs.1 crore that clearly showed that the petitioner was not ready and willing to perform his part of the contract and therefore was not entitled to any relief of injunction. The letter dated 20th September 2002 must be read as a whole. In paragraph no.1 of the letter, the petitioner has pointed out that the respondent had been unable to perform its

part of the contract. Though it had agreed to allot 100 acres of land till then it had been able to purchase in all about 50 acres of land out of which only 27 acres fell in the land to be allotted to the petitioner. The respondent had also not obtained the permission for non agricultural use. The petitioner had not indicated that he was not ready to perform his part of the contract but asked for the refund because the respondent had not performed his part of the contract. If the matter rested with that letter respondent could perhaps have contended that the agreement stood terminated and therefore the petitioner was not entitled to claim specific performance. The respondent however responded to the petitioner's letter by its reply dated 6th December 2002 urging the petitioner not to terminate the contract. It pointed out that as per the new policy of the government, it was possible to develop the land and it was possible to acquire the remaining land immediately. The respondent therefore requested the petitioner to bear with it for some time and to clear the matter. This was followed up by two more letters dated 14th October 2004 and 7th February 2005 which disclose clear intention of the parties that they treated the agreement to be in force and that

the respondent was willing to perform its part of the contract. In the letter dated 7th February 2005, respondent wrote :

> "We wish to inform you that the plot sold to you is in the urbanizable zone. We are working towards further permissions and shall come back to you. We hope to be able to deliver the plot to you soon."

This letter unequivocally showed that the parties waived the petitioner's letter dated 20th September 2002 asking for the refund. The petitioner relying upon the respondent's assurance that he would perform his part of the contract soon and would deliver possession of the suit land to the petitioner did not act upon his letter of demand for refund of the advance. Again it is a matter for the Arbitral Tribunal to decide what is the effect of the letter dated 20th September 2002; whether it amounts to the recession of the contract or whether the letter did not amount to recession of the contract and the parties even thereafter treated the contract to be

subsisting. It cannot be said that the petitioner has not even made a prima facie case worth the consideration of the Arbitral Tribunal for grant of relief of specific performance.

10. Learned Advocate General lastly submitted that the notice of arbitration dated 24th October 2005 itself indicated that the petitioner was not ready and willing to perform its part of the contract and was not infact interested in claiming only the damages. He invited my attention to the monetary claim made in the notice of arbitration. Firstly, it must be stated that in a notice calling upon the other side to refer the dispute to arbitration one is not required to state the claim or claims to be made before the arbitrator. The notice may only briefly refer to the claims to indicate the existence of a dispute. It is before the Arbitral Tribunal that the party making the claims would file the claim statement detailing the claims. Therefore, it cannot be said that the claims which were briefly indicated in the notice of arbitration dated 24th October 2005 were the only claims which the petitioner could make before the Arbitral Tribunal. Secondly, by claim no.1 in the notice petitioner has made a claim for specific

performance of the agreement dated 20th March 1989. Claim no.4 is a money claim made in the alternative. It clearly states that it is a claim in the alternative and made in the event the agreement cannot be specifically performed. Making of an alternative claim in the event the agreement cannot be specifically performed cannot be said to be giving up of the claim for specific performance. The submission of the learned Advocate General that the notice dated 24th October 2005 amounts to giving up of the claim for specific performance therefore has to be rejected.

11. Thus, in my view the prima facie case is made out for grant of the relief of injunction. Accordingly, Arbitration Petition is made absolute in terms of prayer clause (a).

12. Needless to say that all the observations made in this order are prima facie only for the purpose of consideration of interim relief and would not bind the Arbitral Tribunal while considering the claims and defences of the parties on merits.

D.G. KARNIK, J